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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963.

No. 1020

Irving Eisenberg and Edith Eisenberg,

Petitioners,

vs.

H. D. Goldstein; Alvin Goldstein, individually and d.b.a. The La Salle Mortgage & Realty Co.; Charmaine Dice; Ben H. Kessler; City of Chicago, a municipal corporation; additional defendants: Sidney Blumberg; Ruth Gluten; Louis Slutsky; Allen Fishbain and Leonard Goldstein,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Irving Eisenberg and Edith Eisenberg, petition for Writ of Certiorari to review the opinion and judgment; and, denial of petition for rehearing, of the Supreme Court of Illinois.

OPINION BELOW.

The opinion of the Illinois Supreme Court, reprinted in the Appendix, is reported at 29 Illinois 2d 617, 195 N.E. 2d 184.

JURISDICTION.

The date of the judgment-opinion is November 26, 1963, rehearing denied January 20, 1964. The statutory provisions petitioners believe confer jurisdiction on this court is Title 28, sec. 1257; and Rules of this court, Part V, Jurisdiction on Writ of Certiorari, rule 19.

QUESTIONS PRESENTED.

1. Does the opinion below violate the due process and discrimination clauses of both the United States and Illinois constitutions, in

(a) setting out on behalf of the defendants below defense of laches, where defendants had not set out same in the trial court, nor in their appellees' briefs below?

(b) setting out such defenses where the Civil Practice Act of Illinois, then in force, provides that no defense of laches or estoppel shall be permitted unless specially pleaded, with detailed facts (sec. 43(4))?

2. Was there violation of these clauses in

(a) not finding, expressly, that defendants were in default for failure to answer plaintiffs' supplemental complaint alleging, inter alia, that defendants misrepresented the income of the involved property resulting in fraud against plaintiffs?

(b) in setting out and permitting such defense of laches in the opinion where no notice nor hearing thereon had been had at any time, neither before the Master, nor in the trial court?

3. Did the opinion below discriminate against petitioners in failing or refusing to give petitioners benefit of:

(a). the Conveyance Act then in force in Illinois, which provides that any conveyance not containing restrictions as to title shall mean a fee simple title?

(b) The Statute of Frauds, in permitting a realty easement to be purportedly created based solely on disputed oral testimony, where a written contract was executed subsequent to such disputed oral testimony; and,

(c) where a clear deed of conveyance, with no easement therein, was delivered to petitioners subsequent to such testimony and executed contract? Was there denial of equal protection of laws to petitioners?

4. (a) Did it discriminate against petitioners in approving finding of the Master and trial court that such oral testimony proved that petitioners accepted such easement, where the contract is silent therein, or as to any encumbrances, except financial arrangements?

(b) Did the opinion discriminate in not finding, and holding, that the delivery of the clear conveyance deed was fraudulent in equity and law, where the property was in fact encumbered with easement?

5. Was there discrimination against petitioners in

(a) only setting out testimony of one defendant asserting petitioner orally saw and purportedly accepted, easement, and not setting out the denial testimony of petitioner?

(b) failing to set out the testimony of City experts and others that the property involved, and prior to their examinations, violated housing, electrical and other regulations of the City of Chicago, and solely noting the Master's finding that such violations were "maintenance" only?

(c) Was there discrimination in failing to set out testimony favorable to petitioners, with the opinion finding that defendants-respondents were guilty of misrepresentations, without specifying?

CONSTITUTIONAL PROVISIONS, STATUTES, THE UNITED STATES CONSTITUTION.

Article III—The Judiciary * * * The judicial power shall extend to all cases, in Law and Equity * * * In all other cases * * * the Supreme Court shall have appellate jurisdiction, both as to Law and Fact.

Article IV—Sec. Full Faith and Credit shall be given in each state to the * * * judicial Proceedings of every other State. Sec. 2. The Citizens of each State shall be entitled to all privileges and immunities of Citizens in the several States * * *

Article VI—Clause 2. Supreme Law of Land. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

USCA—Constitution—Amendment XIV—Sec. 1 * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Smith-Hurd Illinois Annot. Statutes—
Constitution of Illinois.

Preamble—We, the people of the state of Illinois * * * in order to * * * establish justice, insure domestic tranquility * * * promote the general welfare * * * do ordain and establish this constitution for the state of Illinois.

Article II—Bill of Rights, sec. 1, Natural Rights * * * certain inherent and inalienable rights, among these are life, liberty, and the pursuit of happiness. To secure these

rights and the protection of property, governments are instituted among men. Sec. 2. No person shall be deprived of life, liberty or property, without due process of law. Sec. 14. No ex post facto law, or law impairing the obligation of contracts, or making any * * * special privileges or immunities, shall be passed. Sec. 19. Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely * * * completely and without denial, promptly and without delay.

Article III—Distribution Of Powers.

Departments of government—The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted. Article IV concerns the Legislative, and, VI the Judicial Departments.

Illinois Civil Practice Act Of 1933
Smith-Hurd Ill. Stat. Annot. Chapter 110

Sec. 40(1) Pleadings to be specific—General issues shall not be employed. Every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates. (2) Every allegation, except allegations of damages, not explicitly denied is admitted, unless the party states in his pleading that he has no knowledge thereof sufficient to form a belief, and attaches an affidavit of the truth of the statement of want of knowledge, or unless the party has had no opportunity to deny. (3) Denials must not be evasive, but must fairly answer the substance of the allegation denied.

Sec. 42(1) If any pleading is insufficient in substance or form the court may order a fuller or more particular statement. If the pleadings do not sufficiently define the issues the court may order other pleadings prepared.

Sec. 43(4) The facts constituting any affirmative defense, such as * * * estoppel, laches * * * want or failure of consideration in whole or in part, and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint * * * and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.

Sec. 101.44—Rehearing in the Reviewing court. (1) A party desiring a rehearing * * * shall * * * file with the clerk * * * petition in accordance with the rules * * * The petition shall state briefly the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the original abstract and brief relied upon, and with authorities and suggestions * * * in support of the points. Reargument of the case shall not be made in the petition. Any petition violating this rule will be stricken.

STATUTES INVOLVED.

(I) Our Statute of Frauds, Chapter 59, sec. 2, provides that no action shall be brought upon any contract for the sale of lands, unless a contract or memorandum thereof shall be in writing. (Feb. 16, 1874).

(II) Our Conveyance Act, Chapter 30, provides:

Sec. 8: Deed for the conveyance of land may be substantially in the following form: "The grantor * * * for and in consideration * * * in hand paid, conveys and warrants to * * * the following described real estate * * * in the state of Illinois." "Every deed in substance in the above form * * * shall be deemed * * * a conveyance in fee simple * * * with covenants on the part of the grantor (1) that at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were then free from all incumbrances; and (3) that he warrants to the grantee * * * the quiet and peaceable possession of such premises * * * And such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at length in such deed." (as amended, 1951, July 11).

Sec. 12: "Every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." (March 29, 1872).

STATEMENT OF THE CASE.

Numerals refer to the Abstract of record, unless otherwise noted.

Plaintiffs filed their Equity action in the superior court of Cook County, Illinois to rescind a deed of conveyance and second mortage; to enjoin the City of Chicago from proceeding against them with a "Task Force" prosecution; to enjoin foreclosure of the second mortgage; for return of properties they conveyed to defendants, or in alternative, for damages. Plaintiff Irving Eisenberg, hereinafter referred to as "plaintiff" and defendant Ben H. Kessler, are lawyers for more than 30 years.

Pleadings—Plaintiffs.

(1) The complaints (1-15) alleged the parties executed a real estate exchange contract wherein they agreed to convey their respective properties, plaintiffs to assume certain mortgage indebtedness, including a second purchase—money mortgage. The defendants' property, a furnished apartment, or, rooming-house, property, was located on Sheridan Road, and is the subject matter primarily of these proceedings. The contract provided, inter alia, that all parties were to convey "good title". Defendants furnished certain statements showing gross income of more than $27,000, and bearing the legends: "Above information is subject to verifications and no liability for errors or omissions assumed * * *" and "This building has regently been painted complete, exterior and interior, and is in first rate physical condition." These statements are attached to the complaint as Exhibits. In addition, are attached 8 pages of violations issued by the City against plaintiffs, the

contract, and others including the conveyance-deed delivered by defendant Attorney Kessler, and the letter of direction to the trustee bank, witnessed by Kessler. The city filed appearance, no answer.

(2) Plaintiffs further alleged that during the negotiations, defendants were informed that plaintiff had a heart condition which prevented him from making a full inspection of the Sheridan Rd. property; and, that both plaintiffs relied on the representations of defendants, as well as on the statements-exhibits; that, defendants assured plaintiffs there were no serious violations; that 5 months after delivery of deeds the city "Task Force" filed notices of violations.

(3) Count II charged that Attorney Kessler, representing the defendants, grantors, knew of the easement against the defendants' property when he ordered the letter of direction therefor (which he witnessed); and, when he delivered the deed to plaintiffs. Neither the contract, nor the letter of direction, nor the conveyance-deed, contained any mention nor reference of any easement or like encumbrance; that no letters of opinion (reports of title) were exchanged; that such issuance and delivery of the deed was fraudulent, in that the property in fact was subject to an ingress-egress easement, of which these defendants were fully aware. That, the city required plaintiffs to reduce the living units from 30 to 20.

(4) There is no denial that the deeds issued by plaintiffs to defendants, as consideration for the involved conveyance-deed and the assumed 2nd mortgage, were good in that they in fact conveyed clear title to plaintiffs' properties, which defendants hold and own to this date.

Pleadings—Defendants.

Defendants filed motion to strike the complaint, the motion including an allegation as to laches, and denied by the trial court. (16-18). Thereafter, they answered (18, except the City), admitting all parties agreed in the contract to convey good titles; admitted the statements-Exhibits; denied they represented the property was a good sound business, calling attention to the disclaimer statement; admitted plaintiff mentioned his heart condition, denied he stated it was impossible for him to make complete physical inspection and that he was relying on them; denied they assured plaintiffs there were no existing violations of any substantial defects, are "informed that plaintiffs were furnished a letter of opinion * * * of the property"; that plaintiffs relied on same rather than on any statements of defendants; deny their deed was fraudulent; that, when the deal was closed plaintiffs accepted the deed as tendered in full compliance of all obligations; that the contract was marked "Cancelled by performance." Counterclaim to foreclose the second mortgage was filed with the answer.

Reply of Plaintiffs.

Plaintiffs' reply reiterated his heart condition; that plaintiff Edith Eisenberg knew little about real estate dealings; defendants knew or should have known of the physical defects in their property when they owned and managed it; denied that letter of opinion was exhibited; that plaintiffs relied on the contract and delivered deed; for good reasons plaintiffs did not discover the easement until after the issuance of the guarantee policy (ordered by defendant, Attorney Kessler).

Supplemental Amended Complaint of Plaintiffs.

Plaintiffs filed their supplemental amended complaint pursuant to order of court, March 7, 1962 (40-8), adopting the allegations of their initial complaints; charging the defendants were aware of plaintiff's heart condition; that, nevertheless defendants persisted in burdening and harassing plaintiff in (1) attempting to rent out the home occupied by plaintiffs without notice (the home being one parcel in the exchange deal), in spite of defendants being aware that plaintiff because of his physical condition was having difficulty in obtaining other living quarters; (2) without notice to plaintiffs, defendant arranged to sell certain personal property in the home, without proper credit to plaintiffs; (3) defendants persisted in refusing to turn over necessary insurance coverage, not done until December 1960, almost a year after the deal had been consummated, and after these proceedings were filed; (4) disputes with respect to payment of existing bills against the property; (5) (¶ 43, par. F, last sentences) that the income of the property transferred by defendants was 7 to 8 thousand dollars less than that represented by defendants; (6) plaintiff was being harassed by creditors, suits threatened, although $500 was on deposit by plaintiffs, with the Clerk of the Court. As a result of such harassments and tensions, plaintiff suffered another cardiac seizure on December 9, 1961, being hospitalized, unable to attend to his practice and business. Demand was made for damages, punitive. (46) Since May 1960, plaintiff spent a great deal of time, money and effort in defending the task force prosecutions by the City.

Subsequent Pleadings by Defendants.

Defendants filed motion to strike the supplemental complaint (61), charging plaintiffs do not set up any matters or facts * * * not previously set up in the original and amended complaint; that specified allegations were already before the Court and adjudicated. On November 2, 1962, defendants on their motion had an order entered that the answer previously filed by them to plaintiffs' initial complaints stand as the answer of defendants to the supplemental amended complaint. (110).

Additional Facts in the Record.

1. Master-in-Chancery Harry S. Stark was appointed in February 1961, to take hearings, which were concluded July 24, 1961 (22-291). Plaintiff filed Memorandum of Law and Facts 30 days later, defendants filed theirs in December, 1961. The Master filed his report the latter part of April 1962 (74) plaintiffs filed objections June 5, 1962 (75), having obtained extension of time therefor, which were overruled by the Master. The trial court upheld the master in entering decree which was appealed directly to the Supreme Court of Illinois.

2. Defendant H. D. Goldstein was appointed receiver June 1, 1961, with his son, defendant Alvin Goldstein, managing the property.

3. (109) City filed petition against receiver, 75-62, for rule to show cause for failure to correct the existing violations. (112) City given leave to amend intervening complaint to make Uptown Federal Savings Association additional party-defendant, summons served 12-18-62.

4. Notice of appeal filed 2-11-63, appealing from decree dismissing plaintiffs' complaints, from decree of foreclo-

sure; that no hearing was had on the supplemental complaint, that the deed of conveyance was fraudulent, that the 2nd mortgage was void for want of consideration; defendants further guilty of fraud in willfully concealing dangerous conditions of property, misrepresenting same, also as to income.

5. (113) In March, 1963, plaintiffs filed petition for rule against the Receiver for failure to file reports of income and expenses. They also filed objections to the proposed decree, in that defendant Alvin Goldstein was purchaser of plaintiffs' equity, that if the decree was entered it would completely wipe out the equity of plaintiffs, approximately, $55,000, and in addition assess a deficiency of $6,556.74, net, a total loss to plaintiffs of some Sixty Thousand Dollars, calling it a shocking inequity.

6. (115) Report by receiver, from 6-3-61 to 2-10-63 showed $32,198.70, analyzed, showed a full 1/3 less income than shown on defendants-statements-exhibits, of $27,000 plus, annually, (Appellants' brief, pp. 20-42), and virtually the same as shown by plaintiffs during the period they had possession, prior to the receiver being appointed.

Note: This is not in the record filed here, but we feel this Court should be informed that on April 9, 1964, receiver filed his sworn final report, from Feb. 16, 1963, to January 22, 1964, showing income of $19,511.59, it being almost the same, pro-rated annually, as the above figures and almost equally comparable to plaintiffs' income, thus again being one-third less than the figures on the statements-exhibits.

Additional Facts or Statements From Testimony, Etc.

1. (p. 21, appellants (petitioners) brief): There is sharp dispute as to whether plaintiff Irving Eisenberg was aware of the easement. Defendants' Attorney Kessler and Alvin Goldstein both admitted they knew of it (134; 281). The latter claimed plaintiff was aware of it before the contract was signed, at the visit to the property (282). Kessler signed the letter of direction as a witness, before the deed was issued and delivered to plaintiffs, (134) and arranged for the deed. He stated that, at the closing, plaintiff said nothing about the easement (135). He was asked whether he did not tell plaintiff that the title was clear, his reply is a full page in the transcript. (135), without a direct answer. There is dispute as to whether plaintiff did see a letter of opinion covering the defendants' property, there is no dispute that none was ever given by plaintiffs to any defendant covering plaintiffs' properties. Plaintiff testified he told defendants, plaintiffs' properties were clear, and if the proper contract was written, if their property was clear, letters could be waived. (217; 220-4). Defendants denied or did not recall this (253; 278-9; 280-7). Kessler submitted a purported copy of a letter of opinion, had it marked Ex. 21, but did not have it admitted into evidence. He testified he mailed it to plaintiff about December 23, (293-4) and had both the original and copy at the Master's hearings. The witness from the Chicago Title & Trust Co., subpoenaed by plaintiffs to produce the reports of title, with photo copies for the record, testified (133) (Appellants' brief 22) the initial letter was ordered by Kessler as of 12-21-59, prepared 12-28-59, with the later letter, also ordered by Kessler, dated 1-5-60, prepared 1-13-60. The Master found Kessler mailed the first one, prepared 12-28-59, about December 22nd (68). Kes-

sler testified plaintiff had placed Kessler's telephone number on Ex. 21, not in evidence, the one he said he mailed to plaintiff about 12-23-59 (295). Plaintiff consistently denied ever having received any letter of opinion from Kessler, nor having seen one at the closing. Mrs. Eisenberg testified no such letter was exhibited at the closing.

2. Exh. 18 containing the legal description of the Sheridan property, was a subject of dispute, as to whether plaintiff had seen the guarantee policy from which this exhibit was prepared,—from which exhibit the legal was inserted in the Exchange contract. (251; 262-3-9; 270; 80; 290;) With respect to the easement, the involved area was at the rear of the property (survey plat is reproduced at the back of appellants' brief below). Def. Alvin Goldstein testified when plaintiffs were at the property several weeks prior to the execution of the contract, at the rear where there were auto stalls in the "alleyway" in back of the property. "You drive up" (267-8). He testified that at that time, prior to the contract, plaintiff had stated that he, plaintiff, had "seen" the easement, denied by plaintiff. (296). Alvin was asked whether plaintiff had looked at the easement, answered in affirmative. (282). The Master found (68) that this plaintiff had on one of his visits, prior to the contract, seen that there was an easement for ingress-egress from garages on adjacent property over the concerned property.

It is disputed whether at this meeting in back of the property, it was dark or getting dark when plaintiffs with Alvin inspected it. This defendant testified (273-4-5-6-7) it was not, both plaintiffs claiming it was. (207-296).

3. At the closing, at Kessler's office, defendants contended plaintiff saw the easement objection on the dis

puted letter, which plaintiff contended, could not have been mailed 12-23-59, when the uncontradicted testimony of the Chicago Title & Trust Co. witness showed it was not prepared until 12-28-59 (259-92), denied by plaintiffs. (212-3; 245-7-8-295-6). The Master found that at the closing plaintiff and Kessler discussed (appellants' brief 23), the letter of opinion, discussed objections, including the easement, and plaintiff agreed to and did accept the deed subject to all objections, including the easement (69).

4. With respect to the physical condition of the property, the testimony of all witnesses: Alvin solely, for defendants; the task force members and others for plaintiffs, is discussed and covered in the Master's report and plaintiffs objections (65-6-7-8) 198—a summary under the heading "Alvin v. City Inspectors and others"). Petitioners say, in substance, the Inspectors et al, testified when they inspected the property early June 1960, with work being done thereafter, that the building contained hazardous wiring, substandard wall partitions, unsafe plumbing; that Alvin in September, 1959, several months before the negotiations and deal, had been served with notice to appear before the City Compliance Board, to answer and make necessary repairs. He filed appearance, promised to do so, but did not. These conditions existed during the negotiations and when the property was transferred from defendants to plaintiffs, December 31, 1959.

5. The Master found, (top p. 68) inter alia, that the violations were "all maintenance problems, etc.". We should note the Master could not foretell developments after he concluded hearings in July, 1961. His findings, in the transcript of testimony, covered some 22 lines, the testimony of all the aforesaid witnesses covered some 200 pages there. They testified from personal thorough examination

of the property, official records and actual work done there, after the task force inspection, before this suit was filed. The developments following the Master's hearings, include: (p. 48, appellants' brief) proceedings by the City against the Receiver, H. D. Goldstein (Sr.), he having petitioned for electrical-violations repairs with bids of $3425.00 and $3725.00. And, in his answer to a city petition, the receiver stated it would cost $18,600.00 or $18,975.00 to correct violations. We feel it proper to point out this represents almost a full year's rent-income. This data the Master did not have, but the trial court did.

REASONS FOR GRANTING THE WRIT.

(Roman numerals refer to paragraphs in the opinion)
(Arabic numbers refer to pages in the Abstract)

I-Re: the opinion below—

1. The opinion states, par. V: "The Master found that Eisenberg had ample opportunity to examine the property * * *, that in fact he personally inspected it, both alone, and, on a second examination, with his wife." We replied in our petition for rehearing, commencing p. 1, in substance that the testimony shows that my first visit was no more than that, it being dark and I was not permitted to go through the property. On the second visit, the weather was cold, I did not go above the first floor. I was asked did I find any violations of the city code, and replied "I wouldn't know what the violations were if there were any." There was also a dispute as to whether it was dark or getting so, Alvin Goldstein contending not, Mrs. Eisenberg and I contending yes (273-6). Pages 92-3 to top page 94, and par. (22) page 95, cover the same subject in my objections to the Master's report, which it is submitted present a fairer picture than that of the Master.

2. The second sentence of V states "It was further found * * *", this involves laches which we refer to below, summarized.

3. The last sentence of V states "The evidence shows that the necessity for most of this work dated back some 37 years before, when the building had been converted to smaller units, and that it is largely a matter of obsolescence." We submit there is far more to this matter than describing it as obsolescence. The history of renewal

problems, rural, suburban and urban, in which the Federal and local governments have taken such great parts, shows the true seriousness. Title 42, The Public Health & Welfare, with some 2643 sections, with a vast amount of involved case law, covers many topics, including housing for the aged and the like, with stress on safety. Whether violations are obsolescence or neglect, the fact remains that under Illinois law, the defendants were legally responsible for all violations while they operated the property and when they contracted to transfer it. This law we set out in our Appellants' brief VIII, pages 49-50, includes the subjects of hand-rails, glass door panels, lot sizes, etc. We respectfully refer the court to same, in lieu of quoting here.

4. (a) Paragraph VI states we failed to point out testimony of the precise representations we claim were made. In our petition for rehearing, beginning page 3, II, to top page 5, we referred to our testimony in the Abstract (217-220-1) which we submit shows we discussed the matters of violations, income and the like with the principal defendants during the negotiations preceding the signing of the contract. We respectfully refer the court to same.

(b) This same paragraph in the opinion refers to the "first rate physical condition" phrase in the statement-exhibit; and, that "defendant's brief makes no attempt to deny that misrepresentations were made. Instead they argue * * * plaintiffs had a duty to inspect, and should have been put on notice" by the disclaimer phrase in the exhibits. Thus, defendants admit, in effect, they made representations, but the opinion does not state what these misrepresentations were, that is, whether as to the legality of the conveyance, or fraud; whether to the physical condition of the property, or income, all or part. Succeeding

paragraph VII holds that defendants cannot avail themselves of the disclaimer, and that where one makes positive statements of material facts, the other party has the right to rely thereon.

5. (a) Opinion paragraph VIII states petitioners inspected the property for themselves and "* * * they relied upon their own judgment, based on such examination, and not upon representations made by defendants." That, under the circumstances, there was no fraud, even though the examination made by them may have been inadequate, so as to lead to mistaken conclusions. In our rehearing petition, (d), page 5, we replied, with Mrs. Eisenberg's lack of knowledge of building structures, mine not much better, plus my physical limitations, we had to depend on defendants' representations.

(b) The subject of fraud in concealment we discussed thoroughly I feel, in our appellants' brief, commencing page 43 to top page 49. We call attention that the opinion, as stated hereinabove, held we had the right to rely on the defendants' statements of material fact. In our brief we cited Illinois law, ALR, Corpus Juris Secundum, and federal cases of *Krupp* v. *FHA*, 285 F. 2d 833, 1961, and *Harry Alter* v. *Chrysler*, 285 F. 2d 903. In our objections to the Master's Report, (95(22)) we said: "The Master states * * * 'the record shows sufficient physical activity on (my) part to have permitted as much of an examination of the property as he would have cared to make'. This, I charge, is without any foundation. How could I possibly do so, especially that part 'as *he would have cared to make.*' The truth is *I was restricted* * * *'".

6. (a) Paragraph IX sets out alleged laches on our part, and being lengthy, we refer the court to it in the appendix. It seems clear the court based its opinion and affirmance in great measure if not primarily on the laches. We pointed out above that this defense was neither raised nor presented by defendants, either before the trial court, or in pleadings. We specifically argued the same in our objections to the Master's report (95) top of page. Since this matter of laches came as a distinct surprize to us, in the opinion, we devoted from page 6 to top p. 11, in our rehearing petition to a most thorough search on this law of laches and estoppel, citing Illinois cases, statute and digest law, and Federal decision. Illinois statutes as shown above prohibit this defense *unless* specially and particularly pleaded. To illustrate why this defense must be so specially pleaded, on page 13 of the rehearing petition, I set out page 14 (d)(e)(f) a resumé of the troubled events following delivery of deeds. That is why this defense must be pleaded, and hearing had, so that full opportunity be given to explain a delay. Moreover, it is deserving of stress that mere delay alone is no defense, there must be shown, in addition, losses and inability to restore to previous positions. It is very earnestly submitted, defendants were neither equitably, legally nor morally entitled to such defense. It being set out in the opinion plainly is discrimination against us, by complete surprise, violating both Federal and Illinois due process clauses, and, depriving us of equal protection of the laws concerned.

(b) The opinion cites in that paragraph the *Greenwood* and *Kanter* cases, neither one cited by defendants. The former was decided in 1891, the latter in 1931, both before the Civil Practice Act. We showed too, page 5, 111, and

page 6 of our petition for rehearing IV(a), we did not go into this in our brief or Argument because I felt it not proper, not having been an issue in the case.

(c) This paragraph also contains: "If, as plaintiff claims, he and his wife are • • • unfamiliar with • • • building trades, he must at least have seen the more obvious defects during that long period of time • • •". We replied thereto, page 11, V, rehearing petition, to top page 13. We argued that experts are required to find the serious, concealed defects, as wiring, substandard walls and partitions, defective plumbing, comparing these to obvious matters as windows, fence, sidewalk. This, moreover, is also a matter of laches, no pleading nor hearings were held thereon.

7. (a) Paragraph X of the opinion discusses the easement stating that the attorney for defendants mailed copy of the letter of opinion to me, not mentioning dates, or my denial of ever having received same. As shown above in the statement of facts or statements from Testimony, etc., Kessler testified he mailed it on 12-23-59, whereas the witness from the Chicago Title & Trust company testified it was not ready until 5 days later, and if it was mailed on the 28th, it went to Kessler; and, if he mailed it to me, which I've consistently sworn not true, I could not have received it until at least the 30th as we argued in our reply brief, p. 3 (3) Yet the Master "found" Kessler mailed it about the 22nd (68), 6 days before it was even ready. It is submitted, such purported finding reported only one side of the story, discriminating against us. It came as another shocking surprise to me.

(b) The same paragraph states: "It further appears, by the testimony of Alvin Goldstein, that on one of Eisen-

berg's visits to the property he observed the garage at the adjoining building and remarked that there was an easement". As stated above, I denied I ever made such remark (90; 296). It becomes then, not a unilateral statement by a defendant, who this opinion held, failed to deny misrepresentation—but is in fact disputed, oral statements. The effect, then, is to have disputed oral testimony, allegedly made *before* signing of a contract, affect the contract. We submit, here too, the opinion presented only one side. Even if Alvin's testimony is to be accepted in preference to mine, which seems weird, unthinkable to me under the circumstances, it is still long-established law that such oral statements cannot change the written contract; or, another way of stating the law is, that all oral representations merge into the written contract. We set this out thoroughly in our brief, beginning on page 24 through top page 39.

(c) We called these facts to the attention of the court below in our petition for rehearing, page 14, VI, to top page 19, stressing the Illinois Conveyance Act, and our Statute of Frauds. We feel it a serious matter indeed, when a bare statement as above, is solely stated: with no mention of the other side, no mention of these statutory provisions, nor of a mass of case law, any or all of which could and should completely reverse such finding. We urge this, too, is discrimination against us, which also came as a distinct surprise.

(d) The final sentence in this paragraph X states: "There is also testimony that on the day of the closing the letter of opinion was discussed, that Eisenberg examined it, and that the only questions he raised related to * * * title insurance and * * * chattel mortgage". Preceding this the opinion states the easement was created in

1906. We bear in mind that, under such circumstances, with a contract calling for a clear title, with delivery of a deed, clear with no mention of any easement; and with attendant discussion as to insurance and mortgage, oral obviously, and no mention apparently of easement orally, should not the written documents prevail? I find it disheartening, that no support is given to written contracts, written deeds. Does it matter when the easement was created, for, if I agree to convey to anyone, a clear title, is not *that* the supreme important obligation? Under such circumstances, it becomes my obligation to so deliver, the same responsibility anyone else should have.

(e) With respect to the assertion that I "saw" the easement, we said in our petition for rehearing, as repeatedly prior thereto, top p. 16 * * * "Not only do I deny it bitterly, but how can one 'see' an easement? For here, there were cars parked in the easement space with he (Alvin Goldstein) enlarging about the income from these spaces, etc. If I did say it, meaning in effect I accepted the property subject to such easement, why did they not have same inserted in the contract? Because I prepared it did not prevent such insertion." On page 15, preceding the foregoing, we cited the Master's statement, bottom page, "The Master does not consider this (my physical condition) as an issue in this cause; first, because the contract out of which all the understanding of the parties must feed, * * *". Thus, the Master recognized, at least then, that the written contract between parties is governing. The opinion not giving this the importance it deserves, it is submitted, amounts to further discrimination because only a supposed, purported oral varying statement, is being stressed. We were entitled in justice to have our side at least presented, with a decision then showing why one is

preferred to the other. The reason of the law is as important, for the reason of the law is the reason *for* the laws.

8. Paragraph XI of the opinion avers that even if I had no knowledge of the easement it must be held I waived it, primarily because the easement information was readily available by "exercise of ordinary prudence." And, "The Master properly found that in accepting the * * * deed as tendered, * * * plaintiffs took title subject to the easement and waived any right they might have had to object". Defendants argued similarly III, page 16, of their appellees' brief: "At the * * * closing plaintiff * * * said nothing about the easement and accepted the trustee's deed as tendered, evidence of which is the contract which has written on it, 'cancelled by performance'". We say, is it not obvious where I have a clear deed contract, and the clear deed itself, why should I ask about an easement, since the deed gives me what defendants contracted to do, convey a "good title". As we said on page 15 or our rehearing petition, some 16 lines from the top:

> "On page 220 (Abstract) appears: 'Mr. Schiller (attorney for defendants) (standing objection) all this conversation 'that would vary a written contract'."

Defendants' brief, pages 17 and 18 acknowledges that "'All negotiations preliminary to the conveyance of property are merged into the conveyance'". On page 16, their brief, defendants say we accepted the deed. We agree we did accept the deed as it then existed, as delivered, a clean deed with no restrictions. In other words, we accepted * * * the same kind of deed we delivered, clean deeds. Then, the Master appeared to agree that the contract was controlling (68), referring to his statement "* * * out of which all the understanding of the parties must feed * * *".

We said (97) in our objections to the Master's finding as above: that I agreed to accept the deed subject to all objections, etc. "This amazing finding absolutely conflicts with the two governing writings, the contract and deed * * *" and on page 96, top: "* * * that I 'saw' an easement seems preposterous, for, how can one possibly 'see' an easement of this kind, egress and ingress? There were no signs saying so. An easement is a matter of record in the books of the Recorder's office, or the like, 'visible' only in deeds, tract books, maps, etc., and only those having actual knowledge can possibly have any personal knowledge of same; thus, here, only the defendants could possibly have known of this easement. Nevertheless, they executed a contract to convey clear title; and, they delivered a clear deed, free from any such easement * * * in writing.".

(b) I quote from our rehearing petition page 16 (b): "Here is where, it is earnestly submitted, I feel our Conveyance Act shows the reason for it, it plainly says any deed delivered without restriction means unequivocally a fee-simple, clear title deed. I again earnestly submit, this Court may have overlooked this. I as earnestly feel it is a most serious matter in law if disputed oral testimony is permitted to go contrary to * * * two express writings, the contract and deed. * * *."

9. (a) The balance of the opinion concerns the income, that there was no proof as to the falsity of the $27,000 plus figure; and also laches, in that the within suit was not filed until almost a year after the exchange was made and we went into possession.

(b) The subject of laches has been discussed above, so that the assertion towards the conclusion of the opinion, that it was incumbent upon us to show excuse for the

stated delay and that we failed to comply with same plainly cannot apply in this case, for defendants had the initial burden of setting up such defense specially, which they failed to do, therefore under Illinois statutory and case law that defense is not available to them.

(c) The item of proof of the claimed misrepresentation of the income is we submit, subject to similar objection. First, as set out above, in our supplemental complaint (not the initial), and which neither the Master nor the trial court considered, we alleged the claimed fraudulent misrepresentation of income. Defendants abandoned their supposed motion to strike and on their own motion had the answer to the initial complaint stand as answer to this supplemental complaint. They thus failed to deny this allegation, therefore pursuant to Illinois practice act, as above shown, this allegation for the record stands admitted. We called the court's attention to the fact no hearing had ever been had on this supplemental complaint, in o... Notice of Appeal, par. 4, in above Additional Facts In The Record. The initial complaint was filed December, 1959, less than a year after the within deal was closed.

(d) According to the law we cited in our appellants' brief, pages 40-1, it is established (1) that a vendor's false representation as to past income and profits is a false representation of a material fact * * * (2) Where vendee after taking possession of a business at once experiences a business volume sharply below that represented to have been enjoyed by vendor, an inference may be drawn that vendor's representation was false. We cited *Spiess* v. *Brandt*, 1950, 41 N.W. 2d (Minn.) 561; 27 A.L.R. 2d 14, where in was cited *Forman* v. *Hamilburg*, 300 Mass. 138, 14 N.E. 2d 137. We as vendees, thus established our prima facie case, by virtue of Illinois statute and other case law.

the burden therefore shifted to defendants to refute same. Defendants simply evaded answering these statutory and case laws and attempted to shift that burden to us, without justification. We went into this fully in our petition for rehearing, page 19, VII, to page 21. We submit, this too, amounts to discrimination against us undeservedly, and another shocked surprise in view of the law shown. Here, too, we were not given equal protection of our laws, the same as any other person in this jurisdiction is entitled to, under these circumstances.

REASONS FOR THE WRIT — II.

(1) We concede we have not in express language, complained of these alleged constitutional violations against us, but do submit we expressed same in substance, indirectly. As stated above, we said in our Notice of Appeal we were not given any hearing on our supplemental complaint, this we submit violates our due process clauses, United States and State, in depriving us of property without notice, an indispensable element of due process. We asked, p. 56, of our appellants' brief, toward the end of the top paragraph: "* * * and remand for further hearing on our supplemental complaint for damages".

(2) The final paragraph in that brief, top page 57 stated "To permit these defendants to prevail, keeping the properties of plaintiffs plus the property defendants purportedly transferred, with a deficiency, would it is submitted, be a most undeserving case of unjust enrichment and undeserved, and unjust losses." The conclusion of our rehearing petition, page 22, states: "We earnestly submit to this court, that this our prayer for rehearing be allowed. If it be not, it means we lose all we transferred in good

faith to defendants, plus the heavy deficiency entered; and, defendants still keep the property on Sheridan Road. I submit this would be unjust enrichment to them, and wholly unjust losses to us. We do not deserve this." We submit this is an action in Equity, that these statements as to unjust loss of property (which with the deficiency amounts to some $60,000.00) is equal to allegations of unjust deprivation, or, depriving of property without due process of law, notice and hearings.

(3) In our objections to the Master's report, Abst. page 96 (23a), we referred to the Illinois Conveyance Act; "And * * * we have our Conveyance Act, all of which I set out in my previous Memorandum. The Master has completely ignored this * * *". "He should find * * * that in law, in fact the defendants failed to convey the good title they contracted to do, in writing."

REASONS FOR THE WRIT — III.

With respect to the responsibility of Attorney Kessler, as a defendant here.

(1) Feeling we have above average responsibilities, ethics in practicing our professions, I feel very strongly about Mr. Kessler's acts in this transaction. In our conclusions, page 55, of our Appellant's brief, I stated:

> "* * * it is submitted and as we argued in the brief submitted to the Master, he should be liable and responsible as a principal defendant, i.e., those primarily involved in negotiating and or handling the within transaction, as distinguished from the beneficiaries * * * we pointed out before, and do so now, because he was fully aware of the easement; was fully aware of the

contract and deed providing for clear titles, yet he was primarily instrumental in ordering a deed he knew could not comply with the contract, in addition to ordering and preparing, and witnessing the letter of direction for a clear deed. He was the one who passed the deed. He, of all persons, dealing with another lawyer, according to our Ethics and just simple, fair, honorable dealings,—as he would have justifiably expected from another lawyer dealing with him, should have above board, candidly, without hesitation, advised this plaintiff, when he passed the conveyance deed, and, accepted plaintiffs' purchase money 2nd-mortgage, that the deed he was delivering did not represent the true condition of the property on behalf of whose owners he was acting. We earnestly submit, and particularly as a lawyer who believes in adequate responsibilities of our profession, he is fully at fault as the other principal defendants, H. D. Goldstein, his son Alvin, and the co-operating broker, Dice * * *".

(b) Public relations of the Legal Profession are poor. It is sad, but unfortunately true, that our public relations, our public image, leaves much to be desired. There have been a number of such exhibits recently. In June of 1963, the press published the findings of the Missouri Bar, the heading reading: "Bar Survey Finds Lag in Lawyer Prestige". The text stated: "Persons who have never retained a lawyer hold the legal profession in higher esteem than those who have. There is a 'shocking lack of confidence' among the public on the possibility of getting a fair trial * * *". The report continued: "* * * This was not necessarily a reflection on the courts themselves * * * but rather a belief that indigent and lower economic groups were at a disadvantage * * * because of a lack of knowledge concerning their rights and the need for counsel * * *", but

needless to say the unfavorable picture is there. The Chicago Law Bulletin reprinted parts of the survey in January, 1964, citing that lawyers economically have not kept pace with other professions. Similar remarks were made and reported in the Bulletin of Feb. 4, 1964, by the board chairman of a large company, and a lawyer, the article stating the importance and influence of our profession is rapidly declining.

(c) On April 13, the Bulletin reported the statement by Mr. Justice Tom Clark "Criminal lawyers of our day are not adequate to the defense of persons charged with crime," made at the University of Cincinnati, before the students and faculty of the law school. Justice Clark said, further, according to the report "the practice of criminal law has reached such a degrading stage that seldom does a lawyer undertake it * * *". In the next day's issue, the president-elect of the American Bar Association stated that an underlying cause of mounting crime in the U. S. is an "excessive tolerance" on the part of the public which condones marginal or unlawful conduct that leads to disrespect for law and the rights of others." "* * * Rather, I have in mind the cynical and apathetic attitude of our time * * * which leads to disrespect for law * * *". In an article in the Saturday Evening Post, issue of March 7, 1964, a well known lawyer remarked "The legal profession is perilously close to losing the respect of the American people", citing various reasons and causes. A well-known Clergyman in March of 1962, remarked in the same vein.

(d) I therefore submit, in all seriousness, if this Court grants the writ, this aspect ought to be one of the serious reasons, for, if our judiciary does not police our profession, if we in it do not do so, who will? And how can we hope to obtain that respect for our profession, which the great ma-

jority of us in practice are fully entitled to, if those few who do cause us difficulty are not made to account? All of us have paid a heavy price for education, finally attaining at least a fairly desirable position in our lives and practices, it is sincerely submitted it is the solemn duty of all of us, and particularly the judiciary holding the greater influence, to protect this valuable property, all we really have in the long run, by appropriate, effective policing.

(c) If this court agrees with me herein, I ask on behalf of our profession as well as myself, that appropriate remedies be instituted. I concede strong feelings. It is a bitter experience to be in danger of losing the huge sum involved here, all we've saved, where we fully, completely, kept our side of the deal, honestly, as we promised and contracted to do. In justice, in equity, the other side should be made to account likewise.

REASONS FOR GRANTING THE WRIT — IV.

An unusual hardship result, especially in Equity, and unexpected, showed to be one sound reason for granting the writ of Certiorari. It is submitted this situation exists in our case here. As stated before, we do not deserve these great losses; and surely, these defendants do not, legally, equitably nor morally, deserve this great unjust enrichment.

REASONS FOR GRANTING WRIT — APPLICABLE LAW.

1. It is fundamental that our system of government is divided into the three branches, and none may encroach on the other. Thus, in our case, where the opinion of the Court below failed or refused to give to us the benefits of our Statute of Frauds, our Conveyance Act, our statutes, besides case law, its effect is to void such legislation, or another way of saying it may well be that such opinion is in a manner legislating. It has been said that "Our entire economy * * * largely depends on buying and selling". We may well add this is substantially true throughout the civilized world, not only here, and therefore the solemn, serious rights of contracts need all the protection needed to keep them inviolate. The principle is the same, whether a child buys a penny candy, or in a multi-billion dollar deal, and that is, if you make representations, especially in writing and express, you should be compelled to back them up. That is simple justice, honesty, the sensible application of what is known as the golden rule. What is known as the "medieval market place" should be wiped out. Caveat Venditor, not caveat emptor.

2. From the USCA volume Constitution, Article 1, sec. 10 to Article 7, the following we submit justifies the issuance of the writ in our case: page 3, referring to impairment of contracts; page 40, Purpose: the object of this clause is to protect vested rights, citing among others the Ill. case of *Dodge* v. *Board of Education*, 1936, 364 Ill. 547, 5 N.E. 2d 84. Page 43: "The jurisdiction of this court does not depend upon the form in which the legislative action is expressed but rather upon its practical effect * * *" citing *Detroit Ry.* v. *Michigan*, 1916, 242 U.S. 238. I realize this

holds as to legislative action, but submit logic of events and other citations below should and can include decisions as here. Page 47: Means of enforcement—"Obligation of contract" is means provided by law for enforcement thereof, and any law which materially changes binding force of contract impairs it. *McNee* v. *Wall*, 1935, 87 F. 2d 768. The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be * * * The ideas of right and remedy are inseparable. *Edwards* v. *Kearzey*, 1877, 96 U.S. 600. There are many like citations, from as early as 1823.

3. On page 53, there appears to be difference of opinion as to whether this impairment clause applies to judicial decisions. The argument for is stated: "Spirit of this clause should govern courts as well as legislative bodies, and the court should never approve any attempt to impair the obligation of contracts, notwithstanding prohibition is only effective against legislative bodies. *U. S. ex rel.* v. *City*, 1936, 17 F. Supp. 59. State judicial decision can no more impair contract than can legislative act. *Brown-Crummer* * * * v. *Town* * * *, 1935, 11 F. Supp. 73. The obligation of a contract made in compliance with law cannot be impaired by judicial decision. The construction of a state statute, so far as contract rights acquired under it are concerned, becomes as much a part of the statute as the text itself; and a change of decision is to all (con'd page 54) intents and purposes the same in its effect on contracts as an amendment to the law by means of a legislative enactment, and the rights of the parties are to be determined according to the law as it was judicially construed to be when the contract was made, citing *Union Bank* v. *Oxford*, 1898, 90 F. 7, 10. Succeeding pages include many more; I feel in the interests of brevity these suffice.

4. Page 71—Where this clause is invoked, Supreme Court may determine for itself meaning and effect of contract. *Violet* * * * v. *Grace*, 1936, 297 U.S. 119. Where this clause is invoked, Supreme Court must determine for itself nature and effect of alleged agreement and whether it has been impaired. *U. S. Mortgage* v. *Matthews*, 1934, 293 U.S. 232, page 75—A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation. State * * * Tax on Foreign-Held Bonds, 1873, 15 Wall. 320, and more like decisions. I would add that, in substance and effect, every decision makes law, in some manner, its effect as to stare decisis is important and should be considered carefully wherever, and by whom, so decided. It bears repetition that our case is an Equity action, with real equities to be considered, real human welfare. I feel it significant, indeed even more going through this experience, that the everlasting phrase reads: "No person shall be deprived of life, liberty or *property*, without due process * * *" (italics mine).

5. page 86.—Extent of Impairment—The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity this clause and the judicial power of this court to redress the wrong. *Fairmount* v. *Tennessee*, 1878, 95 U.S. 683 * * * See also *Bruce* v. *Schuyler*, 1847, 9 Ill. 276. There are like decisions of other states. And in 1823, the case of *Green* v. *Biddle*, 8 Wheat. 84, decided: "The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change * * * Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those

which are, however minute or apparently immaterial in the effect upon the contract, * * * impairs its obligation." There are many like decisions. There is law prohibiting suspension of proceedings, except in cases of war or like emergencies. It is submitted, likewise, that rights may not be suspended, nor wiped out, except possibly some moratorium laws in restricted cases (p. 97-8.)

6. On page 150, under Powers-generally, we find the *Dartmouth College* case, v. *Woodward*, 1819, 4 Wheat 629, holding in substance where the legislature has the power to legislate, it may do so without restraint. Thus, in our case, it is submitted, comparing effects and results, that the opinion below infringes on our legislature in actually suspending the laws passed by the legislature, several some 90 years old, the Statute of Frauds and our Conveyance Act, set out on page 9 of our Appellants brief. See also, the Illinois case of *Bush* v. *Shipman*, 1943, 5 Ill. 192, cited there with the *Dartmouth* case.

7. Beginning on page 477, the appellate jurisdiction of this court is described. Then follows the famed comment by Hamilton, The Federalist, XXII, from which I quote in part: "* * * Laws are a dead letter without courts to expound and define their true meaning and operation * * * treaties, like all other laws * * * be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensable. If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only

different courts but the judges of the same court differing from each other * * *." Mr. Hamilton may well have in mind other frailties of the human being, on the following page 486, we find: "* * * if left to the courts of justice of the several states conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from local influences. Accordingly * * *, in clear, precise, and comprehensive terms. It is declared by the Constitution that its judicial power shall * * * extend to all cases in law or equity arising under the Constitutions and laws of the United States * * *". *Ableman v. Booth*, 1859, 21 How. 518, 16 L. Ed. 169. And on page 489: There "should be a central tribunal * * * The value of uniformity of decisions where the Constitution and laws of the federal government are to be expounded in cases of individual rights * * * that every citizen * * * be protected by * * * the highest authority and free from local prejudice or passions in the enjoyment of all the rights, exemptions, and privileges with which the Constitution and laws of the union invest him, cannot easily be exaggerated * * *" *Ferris v. Coover*, 1858, 11 Cal. 179.

8. For comparative purposes and fundamental logic, I refer to our Full Faith and Credit clauses, and suggest that likewise, full faith ought be given to our lawful, reasonable, local, domestic laws, regulations, and contracts, for if such faith exists in what has been described as the "grass roots", the literal soil of our system of justice would more readily produce sound justice, more respect by us for the real rights of our fellow beings. It would help eradicate what has been termed "Revolving Door Justice". It can make for a better world, for more human beings.

9. Article I, sec. 2.—The citizens of each State shall be entitled to all privileges and Immunities of Citizens in

the Several States. On page 599; Purpose: The intention of this provision was to confer on the citizens of the several states all the privileges and immunities which the citizens of the same state should be entitled to under like circumstances, and this includes the right to institute actions. *Cole* v. *Cunningham*, 1890, 133 U.S. 114. The purpose of this clause is the same as in the 4th Article of the old Confederation, declaring "that the better to secure and perpetuate mutual friendship and intercourse among the people * * * in this Union * * * and shall enjoy the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively," *Slaughter-House Cases*, 1873, 16 Wall 75, 21 L. Ed. 394. This clause refers to those privileges and immunities which are fundamental, belong of right to the citizens of all free governments * * * *Coates* v. *Lawrence*, 1942, 131 F. 2d 110. Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property * * * and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole * * * deemed to be fundamental; to which may be added the elective franchise. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities. *Corfield* v. *Coryell*, 1823, 4 Wash. U.S. 371, 6 Fed. Cas. No. 3230.

10. Special privileges. Page 611: "The 'immunities' secured by the organic law * * * are such privileges as are common to the citizens (p. 612) * * * under their laws, and do not embrace special privileges created by this local law." This and like cases in these pages involved principally the rights of corporations, I feel the thought and reasoning as to special privileges apply in our case too, for, it is submitted these defendants are not entitled to, in effect,

very real special privileges in this litigation. The same arguments apply to other fields reported, as taxation, schools, polls, corporate agents, literally hundreds of different matters, where each class is to be treated alike, including benefits of laws.

11. Supreme Law of the Land—State—page 701—State's power to create judicial tribunals * * * power to hear and determine controversies * * * enter final judgments and issue process to carry them into execution is subject to control and regulation by Congress acting pursuant to its constitutional power. *U. S. Bank* * * *v. Pamp.* 1935, 77 F. 2d 9. Succeeding pages compare treaties, in effect to contracts, which the same as ordinary contracts, should be recognized, respected and properly enforced. I think similar reasoning could be used in our contract, which after all, was or should be, a legal, binding one.

12. On page 20, of the 1964 pocket part, is a discussion of the importance of public welfare and the power of the states to legislate thereon, in proper exercise of its police power. I submit since the property involved here was the subject of intensive prosecution for serious violations, one of the grounds of our complaints, this is true public welfare, and very properly an element to be considered in the thinking and handling of our litigation, for the sake of human beings everywhere, not only locally. The thoughts, as welfare, are universal.

13. Duty of State Courts—page 55—The state courts have the function primarily to interpret state legislation, and not the federal courts. *Davis* v. *Pepersack*, 1958, 255 F. 2d 29. State courts bear equal responsibility with the federal courts to guard rights secured by the Constitution of the United States. *Whitmore* v. *Bureau* * * *, 1946, 64 F. Supp. 911, aff. 329 U.S. 668.

14. Raising constitutional question—page 57, 1964 Pocket Part. A constitutional question may be raised at any time if the matter appears on the face of the recorder, if it is of such nature that it could not have been raised before, if it is of such nature that it could not have been raised before, and the matter is of such nature that it could not have been raised before if the person asserting it did not have knowledge of the facts upon which it was based, or if, for some other adequate reason, such person was prevented from asserting it. *Egan* v. *Teets*, 1957, 251 F. 2d 571. —page 59—Where a federal court is called upon to apply personal constitutional rights it must determine facts for itself on evidence presented. *Law* v. *Mayor* • • •, 1948, 78 F. Supp. 346. Then follows a series of cases on legislative intent, p. 63, purposes of the legislation, reasons and meaning; that the function of the courts is to interpret laws, not to seek to correct legislative enactments. "The court has no power to judicially legislate its individual ideas of the appropriate social and economic practices that should prevail • • • as substitutes for stabilized regulation by statute". *Smith* v. *Clark*, 1945, 62 F. Supp. 971, aff. etc., 157 F. 2d 725.

15. On page 67—In determining constitution validity of state action the same tests are applied regardless of legality of such action under state law. *Snowden* v. *Hughes*, 1944, 321 U.S. 1; In passing on constitutionality of state tax, Supreme Court is concerned only with its practical operation; not its definition or precise form of • • • words. *Citu* v. *Marrau*, 1958, 355 U.S. 489, page 70—Neither judicial nor executive branch of government may enact or amend legislation. *U. S.* v. *Dunning*, 1955, 223 F. 2d 723. The function of judicial interpretation of a statute is to bring out and give effect to that which is already in it, latent or otherwise, and it is not to add new provisions,

substantive or otherwise * * * *Schroeder* v. *Clifton*, 1946, 153 F. 2d 385 * * * It is duty of courts, whenever they can, to interpret statutes in such manner as to avoid absurdity or injustice. *Consumers* * * * v. *Walker*, 1944, 145 F. 2d 416. Court should avoid construction of statute that would render statute ineffective and nugatory. *U. S.* v. *Woodson*, 1961, 198 F. Supp. 582.—page 71—It is for court to give effect to plain words and meaning of statute, rather than to attempt to legislate. *Gauvey* v. *Basin*, 1960, 185 F. Supp. 948, rev. other grounds. Judicial officers must interpret, not make or remake the law. *Nash-Finch* * * * v. *U. S.*, 1960, 184 F. Supp. 735, app. dismissed. More like cases follow for several pages.

16. Repeal by Implication—page 79, 1964 pocket part. Repeals by implication are not favored. *Rosenberg* v. *U. S.*, 1953, 346 U.S. 273—page 85—A statute ought not to be construed to provide for its own self-nullification. *Albers* v. *U. S.*, 1958, 259 F. 2d 122. The intention of lawmakers is paramount in determining meaning of an act. *City* * * * v. *U. S.*, 1958, 254 F. 2d 93. More follow on avoiding absurd consequences; that apparent purpose and intention of the act should be had, with liberal interpretation, etc. On page 122 appears: "The specific language of a statute is the best evidence of * * * intent * * * *U. S.* v. *Border*, 1960, 4 CCPA 10. Statutes should not be construed so as to render them meaningless. *George* * * * v. *U. S.*, 1960, 47 CCPA 123. On page 130 is set out the Delegation of functions, etc., page 134, Jurisdiction of courts, federal and state. The pocket part concludes with additional material on supreme law, privileges and immunities, judicial notice and the like.—page 276—State courts are as much the guardians of federal constitutional rights as are federal courts. *Wiggins* v. *Ragen*, 1956, 238 F. 2d 209; and, State courts are bound equally with the federal courts by the federal con-

stitution and laws. *Public Service* * * * v. *Wycoff*, 1952, 344 U.S. 237.

REASONS FOR GRANTING WRIT — V.

1. While I have researched the volumes on USCA Const. Art. 1, secs. 1 to 9; the XIV amendment; Public Health Title 42, and the Smith-Hurd volume annot. on the Illinois Constitutions, in view of all the foregoing and brevity I hereby just refer to these constitutional provisions and say that, in substance, the law as applicable, in these volumes, may be considered similar to the foregoing. There are, we learn, limits to time available, and, as important, to the human endurance.

2. The following is quoted from Stern-Gressman, Supreme Court Practice, 3rd Edit.

> Page 99: "But there are situations where raising the federal question for the first time in the petition for rehearing is timely. Thus if the question is created by an unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question, the petition for rehearing constitutes his first and probably his only chance to present the matter to that court, citing *Brinker* * ** v. *Hill*, 281 U.S. 673-7, where the highest state court gave the state statute a new and unanticipated construction, which allegedly threatened rights under the federal constitution. Accordingly, the federal question is timely raised * * * This is true even though the petition for rehearing is summarily denied without reference to the federal question. But care must be taken to include the petition for rehearing in the record filed * * * And the litigant must be able to show that the decision of the state court was a surprise and could not have been reasonably anticipated from prior decisions. *Herndon* v. *Georgia*, 295 U.S. 441."

Page 100: "* * * (re: cases where federal question is raised initially in the petition for certiorari): The only exception appears in the rare situation where the highest state court, following a 'surprise' decision wherein the federal issue is born, declines to entertain a petition for rehearing and the federal question can be raised in no other way than through the papers addressed to the Supreme Court. See *Saunders* v. *Shaw*, 244 U.S. 317, 320."

3. Other Additional Law. 88 C.J.S. 161 "Matters not controverted at Trial-Evidence need not be introduced to prove a fact admitted or conceded by the adverse party."

Page 163: "In order to dispense with proof, it must be clear that the fact is uncontroverted." 89 C.J.S. page 351. 'Except for those matters of which the court may take judicial notice, the deliberations of the trial judge are limited to the record made before him * * * hearing must be founded on the pleadings." citing the Ill. case of *Continental* v. *Server*, 393 Ill. 81, 65 N.E. 2d 385. These are submitted in further support of our contention that by virtue of Illinois Civil Practice Act, above quoted, defendants by failing to deny our allegations that the income was misrepresented, have admitted same. The ruling on these points in the opinion below came as a distinct surprise to me, which is why the first opportunity I had to reply to same was in our petition for rehearing, page 20, where I set out sec. 40(2) of our Civil Practice Act, where the argument of admission was made.

4. 4 C.J.S., page 751. "To be considered on review, a matter must have been timely presented to the trial court in a manner sufficient to obtain a ruling thereon * * * Within this rule, 'properly (p. 754) raised' means the question must have been timely called to the attention of the lower court, and this rule has been applied to pleas of estoppel or rati-

fication, laches, * * * and to affirmative defenses." In Burdette-Smith Ill. Digest, 31, 1963-4 pocket part, page 188 is law similar to that quoted above from 89 C.J.S., and on page 192; "Great caution should be exercised by trial judge before determining lawsuit after having heard only one side of case. S.H.A. ch. 110, sec. 64(5)—*McDonald* v. *Neale*, 182 N.E. 2d 366, 35 Ill. App. 2d 140. From 30 C.J.S., page 525: "He who seeks equity must do equity, and he who comes into equity must come with clean hands" * * * page 526: "Where both parties are equally at fault, neither can assert laches as against the other".

CONCLUSIONS — ARGUMENTS.

(a) It is earnestly submitted, that the rulings in the opinion as to laches; the ignoring of defendants not answering our complaint with respect to the income; like ignoring of our Statute of Frauds and Conveyance Act, applicable to Illinois realty matters; in setting out testimony or other matter as to only one side of the case, all came as distinct surprises. They were totally unexpected, as to the laches there is virtually nothing in the entire record below, the same with regards to the defendants not answering. I reread the opinion again in preparing this petition, and was struck with the virtual pleading of issues for defendants, as above. This is so contrary to the functions of a court of review. We complained of these in our petition for rehearing, there was no need or occasion therefor in the initial briefs. Surely, through the Master's hearings, and argument before the trial court on the objections to his report, there was hardly any occasion to discuss deprivation of due process, no notice, no hearing, discrimination

and the like. They were not before the court, nor were they properly before the Illinois Supreme Court when the appeal was first filed.

(b) These arose only with the rendering of the opinion. As a fact, it is common knowledge that courts will not decide constitutional questions, if there are other questions which can decide the issues. So that, in the trial court, the questions were not constitutional, but strictly as to whether a contract was violated, whether a deed was fraudulently issued, whether oral testimony could vary a written contract, and like matters. The surprise in the court's opinion was consequently both surprising and very real. I was stunned, it was so unexpected. It is submitted, therefore, in law, in Equity, in sheer justice, our only available recourse is to this Court.

(c) If this court does not take hold, we will lose so much, where w. fully, completely, kept our bargain in the contract, everything we put into the deal, it will be a hardship, shocking as severe. As we have said, it means unjust losses to us, and so, unjust enrichment to wrongdoers. We pray this will not happen, it shouldn't in justice, in Equity.

Respectfully submitted,

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Edith Eisenberg, *petitioners*,

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APPENDIX

OPINION OF THE SUPREME COURT

Docket No. 37861—Agenda 57—September, 1963

Irving Eisenberg *et al.*, Appellants, v. H. D. Goldstein *et al.*, Appellees.

Mr. Chief Justice Klingbiel delivered the opinion of the court:

I. Alleging fraud and misrepresentation, Irving Eisenberg and his wife brought suit in the superior court of Cook County to rescind a deed whereby they acquired a certain apartment building. They also sought to cancel the purchase money mortgage thereon and to obtain a return of other real estate conveyed in exchange for the building in question. After a hearing before a master the court confirmed findings against the plaintiffs, dismissed the suit for want of equity, and granted defendants' counterclaim for a foreclosure of the purchase money mortgage. Plaintiffs appeal directly to this court, a freehold being involved.

II. The property is located in Chicago at 4065 North Sheridan Road. It is improved with an old three-story brick building containing 30 furnished apartments, 21 of which consist of only 1½ rooms each. In November, 1959, it was advertised for sale by defendants H. D. Goldstein, his son Alvin and one Charmaine Dice, all of whom were apparently in the real-estate business as brokers or otherwise. Plaintiff Eisenberg responded to the advertisement, and negotiations ensued for an exchange of his two parcels of real estate for the Sheridan Road piece.

III. After he and his wife had inspected the property, Eisenberg drew up a contract, thereafter executed by defendant Alvin Goldstein for himself "and all other beneficiaries" of the trust in which title was held, whereby they undertook to convey to plaintiffs "good title" to the apartment property, subject to certain mortgages to be assumed by plaintiffs, and the plaintiffs were to convey their two pieces to Alvin Goldstein "and all other beneficiaries". On December 31, 1959, the deeds were exchanged and the plaintiffs went into possession of the apartment building. The conveyance to the plaintiffs was by trustee's deed.

IV. Plaintiffs filed their present complaint on December 16, 1960, alleging that H. D. Goldstein represented the Sheridan Road property to be in good condition and free of any serious building code violations, that to defendants' knowledge the plaintiffs relied on those representations because a heart condition prevented Eisenberg from making a complete examination himself, and that five months after the deal was closed the city of Chicago investigated the property, finding a large number of violations. It is further charged that contrary to defendants' representations of good and merchantable title, the property was subject to an ingress and egress easement in favor of an adjoining building to the south.

V. The master found that Eisenberg had ample opportunity to examine the property, either personally or by agent, and that in fact he personally inspected it, both alone and, on a second examination, with his wife. It was further found that although in possession and management of the property the plaintiffs made no complaint to defendants regarding its condition until many months after taking possession, and then only after a city "task force" had made

a routine inspection as part of an over-all program for the inspection of old buildings. The inspection at that time found numerous electrical and plumbing defects, and objections were made to the garbage chute location, absence of a vent on clothes driers, deteriorated condition of porches and other woodwork, absence of fire doors, and the like. Plaintiffs were notified to bring the building up to the city's present building requirements. The evidence shows that the necessity for most of this work dated back some 37 years before, when the building had been converted to smaller units, and that it is largely a matter of obsolescence.

VI. Plaintiffs have failed to point out testimony of the precise representations they claim were made. However the advertisement in evidence as an exhibit declares the property to be in "first rate physical condition," and defendant's brief makes no attempt to deny that misrepresentations were made. Instead they argue that the plaintiffs had a duty to inspect, and should have been put on notice by a statement in the exhibit that "above information is subject to verifications and no liability for errors or omissions assumed."

VII. In this the defendants are mistaken. One who by misrepresentation has induced another to act to his prejudice cannot relieve himself of liability by a mere disclaimer thereof in advance, nor can he impute negligence to the other merely because of the latter's reliance on the misrepresentation. The law does not require that neither shall believe the statements of the other. If one party makes a positive statement of a material fact as true which he knows to be false but intends to be relied upon by the other party as true, and the statement actually is relied and acted upon as true by the other party, the party making the statement cannot

charge the other with negligence in believing it. *Gillach* v. *Hamlin*, 297 Ill. 258.

VIII. In the case at bar the evidence is undisputed that the plaintiffs inspected the property for themselves. It is quite clear that in making the exchange they relied upon their own judgment, based on such examination, and not upon representations made by the defendants. Under such circumstances no fraud was practiced upon the plaintiffs of which they can complain, even though the examination made by them may have been inadequate, so as to lead to mistaken conclusions. See *Greenwood* v. *Penn*, 136 Ill. 146, 155-156.

IX. Moreover the plaintiffs failed to promptly complain of the alleged misrepresentation upon discovery of the facts. Instead they continued in possession, collecting rents, managing the property and making payments on the mortgage. It was not until the present suit was begun, almost a year after the deal was closed and possession taken, that they sought to rescind. If, as plaintiff Eisenberg claims, he and his wife are unskilled in construction and unfamiliar with the work of building trades, he must at least have seen the more obvious defects during that long period of time. His attention must have been called, at least in part, to the untruthfulness of the defendants' representations about the building's deteriorated physical condition, and if personal observation did not disclose its full extent there was obviously enough to make it his duty to use ordinary diligence to make further investigations. A person who has been misled by fraud or misrepresentation is required, as soon as he learns the truth, to disaffirm or abandon the transaction with all reasonable diligence, so as to afford both parties an opportunity to be restored to their original position. If, after

discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of relief from the misrepresentations. *Kanter* v. *Ksander*, 344 Ill. 408; *Greenwood* v. *Fenn*, 136 Ill. 146.

X. Plaintiffs next contend that since the premises were subject to an easement, "the deed of conveyance, in not conforming to the written contract to convey a fee simple title, was fraudulent, void." It appears that there is an alley-way along the building leading to parking stalls at the rear and also to the garage of an adjoining building. This easement for ingress and egress, and for light and air, was created in 1906. A notation of its presence appeared on a letter of opinion as to title, which the attorney who closed the deal on defendants' behalf testified he mailed to plaintiff Eisenberg. It further appears, by the testimony of defendant Alvin Goldstein, that on one of Eisenberg's visits to the property he observed the garage at the adjoining building and remarked that there was an easement. There is also testimony that on the day of the closing the letter of opinion was discussed, that Eisenberg examined it, and that the only questions he raised related to the amount of title insurance and the presence of a chattel mortgage.

XI. Plaintiff Eisenberg, who is a lawyer with some 30 years' experience, nevertheless insists he was unaware of the easement and relied on defendants to provide the "good title" called for by the contract. There is no merit in this contention. On this record it is difficult to believe that he had no knowledge of the easement, but even in such a case he must be held to have waived any claim he might have had to rescind on that ground. The information pertaining to the easement was readily available. Under such circum-

stances no complaint can be made, since the injured party could have availed himself of the facts by an exercise of ordinary prudence. (*Bundesen* v. *Lewis*, 368 Ill. 623.) The master properly found that in accepting the trustee's deed as tendered the plaintiffs took title subject to the easement and waived any right they might have had to object.

XII. It is finally urged that defendants represented the income from the property to be $27,000 whereas in fact it was $19,000 or less, and that the misrepresentation constituted fraud, entitling plaintiffs to rescind. It is well established that representations of income, when made, must be true. Statements representing the rental from property to be in a certain amount are not ordinary "puffing" or the mere expression of an opinion, but are statements of a present fact which will amount to fraud justifying rescission, if relied upon, where the actual rent received is much less. (*Noll* v. *Peterson*, 338 Ill. 552.) Even though the plaintiffs inspected the property they would not be charged with knowledge of facts such as these which by their nature are peculiarly within the knowledge of defendants, and if such a misrepresentation had been proved the plaintiffs would be entitled to relief.

XIII. But a misrepresentation in this respect was not proved. While the annual income was stated to be $27,156, both in the advertised listing of properties for sale and in the detailed statement of the Sheridan Road property, this statement is not shown to have been false. All that the plaintiffs proved is that since they took possession the total rent received is substantially below that represented to have been enjoyed by their vendors in the past. Moreover the plaintiffs point to no evidence of when they first learned of the alleged falsity of the statement. Apparently the first

objection on this account is at or about the time the present suit was begun, almost a year after the exchange was made and plaintiffs went into possession. To establish a case of fraud on this ground it is encumbent upon the deceived party to show there was no delay in asserting his claim after discovering the fraud, or, in case of delay, to show a reasonable excuse therefor. As we have heretofore pointed out, a party who desires to rescind a transaction for fraud must make his election to do so promptly after learning of the fraud. (*Kanter* v. *Kramer*, 344 Ill. 408.) Plaintiffs have failed to show their compliance with this rule.

XIV. No error having been shown in the proceedings below, the decree of the superior court of Cook County will be affirmed.

Decree affirmed.